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IN THE

Supreme Court of the United States

ANTONIO GRANADOS-MONDRAGON,

Petitioner,

—v.—

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pages

QUESTION PRESENTED

Does a resident alien facing deportation have the right to contest the allegation that he entered the United States illegally, or does his plea of guilty to such charges for which he was fined $10 and jailed for 45 days, collaterally estop him from litigating the facts of entry for the first time in his deportation hearing?

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PETITION FOR CERTIORARI

Petitioner, Antonio Granados-Mondragon, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1a-3a) was entered on January 17, 2002 and is unpublished. The opinion of the Ninth Circuit rejecting Mr. Granados-Mondragon's petition for panel rehearing and rehearing en banc (App. 16a) was entered on March 26, 2002 and is also unpublished. The opinion of the Bureau of Immigration Appeals ("BIA") (App. 4a-6a) was entered on November 30, 1999. The oral opinion of the Immigration Judge (App. 7a-15a) was entered on July 27, 1993.

JURISDICTION

A split panel of the Ninth Circuit denied Mr. Granados-Mondragon's petition for review of a final order of the BIA. Mr. Granados-Mondragon timely filed a petition for panel rehearing and rehearing en banc. The Ninth Circuit denied that petition on March 26, 2002. The Ninth Circuit had jurisdiction under section 106(a) of the Immigration and Naturalization Act ("INA"), 8 U.S.C. § 1105(a), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Former 8 U.S.C. § 1251 provides in relevant part:

> Deportable aliens
>
> (a) Classes of deportable aliens
>
> Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be deported if the alien is within one or more of the following classes of deportable aliens:
>
> (1) (B) Entered without inspection
>
> Any alien who entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or any other law of the United States is deportable.

INTRODUCTION

The course of one man's life turns on an issue with far reaching consequences for the federal system: whether a guilty plea to a misdemeanor charge that resulted in a $10 fine and a 45 day stay in jail has collateral estoppel effect in a subsequent deportation proceeding. A split panel of the Ninth Circuit, in keeping with earlier circuit authority on this question, concluded that a prior guilty plea does have collateral estoppel effect in a subsequent proceeding. On that basis, it affirmed the decision of the BIA to deport Mr. Granados-Mondragon for something which the record compiled before the Immigration Judge plainly shows that he did not do.

Although the opinion of the panel majority does not acknowledge it, the practice of giving guilty pleas collateral estoppel effect has long divided the courts of appeals, not just in the immigration context, in many

other areas of the law as well. The Third and Tenth Circuits have held that guilty pleas should not have collateral estoppel effect. The D.C. Circuit, relying on this Court's opinion in *Haring* v. *Prosise*, 462 U.S. 306 (1983) has signaled that it agrees. The First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have joined with the Ninth in holding that guilty pleas should have collateral estoppel effect.

This Court should take this opportunity to resolve this split. It should do what the authors of the preeminent treatise on Federal Practice and Procedure, Professors Wright, Miller and Cooper, long ago urged it to do—"put an end to the present practice." 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4474, at 759 (1981).[1] The practice of giving collateral estoppel effect to guilty pleas has no discernable rationale. It increases the burden on the judiciary. It encourages criminal defendants to take cases to trial and threatens to complicate the process of entering a plea. It makes more sense to admit guilty pleas into evidence and allow defendants to explain themselves.

Thus, Mr. Granados-Mondragon submits that this Court should issue the writ, reverse the decision of the Ninth Circuit and hold, as the leading treatise on the Federal Rules of Evidence instructs, that a guilty plea "is only evidence" on a particular issue and that a defendant "may respond to admission of [a] plea by giving evidence to explain his or her reasons for the plea." 2 Jack B. Weinstein and Margaret Berger, *Weinstein's Federal*

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[1] Professors Wright, Miller and Cooper have renewed this request in the most recent edition of their treatise: "There is little reason for optimism, but it is to be hoped that the Supreme Court will one day put an end to the present practice." 18B Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4474.1, at 459 (2002).

Evidence, § 410.07[2], at 410-22 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2002).

STATEMENT OF THE CASE

Mr. Granados-Mondragon has lived in the United States for more than twenty years. (ER16.[2]) In those twenty years, he has raised a daughter, gone to church, paid his taxes, and helped other, less fortunate members of his community. (ER17-20.) Although still a citizen of Mexico, Mr. Granados-Mondragon became a legal permanent resident of the United States on December 1, 1990. (ER2-4.) On July 20, 1991, he was found in a car with his wife near Calexico, California. How he got there is at the center of this dispute.

A. Entry, Arrest and Guilty Plea

As Mr. Granados-Mondragon explained below, he went to Mexicali, Mexico on July 19, 1991 and arranged for someone to help his wife into the United States. The next morning, he drove back to the United States through a designated port of entry and waited in his car for his wife to climb the border fence at their prearranged meeting point near Calexico, California. According to Mr. Granados-Mondragon, all went well until his wife got tangled up in the fence just as someone or something scared off the person who was supposed to be helping her over. Forced to step in, Mr. Granados-Mondragon climbed up the fence on the United States side of the border, helped his wife down, and took her back to the car. (ER22-24.)

The INS insists that something quite different happened. Although the INS does not say how Mr. Grana-

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[2] "ER" denotes the excerpts of records filed with the Ninth Circuit.

dos-Mondragon got to Mexico or where he met his wife, it argues that its Agents saw Mr. Granados-Mondragon and his wife climb over the border fence into the United States from the Mexico side on July 20, 1991. According to the INS, its Agents watched as the two ran from the fence to a waiting but empty car (which apparently drove itself to the rendezvous spot) where they were intercepted. (ER36-39.)

Based on its version of events, the INS arrested Mr. Granados-Mondragon. It charged him with entering the United States outside of a designated port of entry and failing to submit to inspection by border officials, a misdemeanor violation of 8 U.S.C. § 1325. (ER1.) Facing a threat from the INS that his wife would be taken into custody if he fought the charge, Mr. Granados-Mondragon pleaded guilty. (ER40-41.) He received an incidental sanction—a fine of $10 and a prison term of 45 days. (ER5.)

B. The Deportation Hearing

Although Mr. Granados-Mondragon's guilty plea kept his wife out of jail, it raised the legal stakes for him. The INS sought to deport Mr. Granados-Mondragon for entry without inspection on July 20, 1991 under former 8 U.S.C. § 1251(a)(1)(B). (ER25-27.)

The INS sought to satisfy its burden of establishing by clear and convincing evidence that Mr. Granados-Mondragon had entered the country without inspection in two ways. The INS pointed to his earlier guilty plea. It also relied upon the testimony of Border Agent M. G. Green. (ER26; ER31-33.)

Agent Green did not testify that he or, for that matter, any Border Agent had actually seen Mr. Granados-Mondragon on the Mexico side of the border before he was arrested. In fact, the attorney for the INS neglected

even to ask whether Mr. Granados-Mondragon had been seen crossing from Mexico to the United States. (ER7-10; ER14-15.)

On cross-examination, Mr. Granados-Mondragon's attorney twice gave Agent Green an opportunity to place Mr. Granados-Mondragon in Mexico. Both times, Agent Green testified that Mr. Granados-Mondragon and his wife had been seen only on the U.S. side of the border:

> Q. How did you first come in—know that there was an illegal entry going on?
>
> A. It was observed from an area approximately .8 miles west of the area of the projects where they entered and it was observed through binoculars. The two individuals climbed down the international boundary fence, ran across a drag road and towards the area of the projects and then they were seen exiting the area of the projects and entering a vehicle.
>
> . . .
>
> Q. Did the footprints indicate that the same footprints—[Mr. Granados-Mondragon's] footprints—were they ever in Mexico? Did you—Did you look into that?
>
> A. Well, the area on the south side of the fence it's—it's extremely difficult to see a lot of the tracks and we're not—we don't go down too close to the fence because we either get rocked or spit on or something of that sort. So, we try to stay away from the fence. They were observed. It was an observed entry. The two subjects were observed climbing down the fence and going towards the projects.

(Transcript of May 28, 1992 Hearing at 41-42, *In re Granados-Mondragon*, (Stanton, I.J.) App. 18a-19a.)

The Immigration Judge, apparently unsatisfied with Agent Green's testimony, gave him two more chances to place Mr. Granados-Mondragon in Mexico. Again, Agent Green failed to place Mr. Granados-Mondragon on the other side of the border:

> Q. Mr. Green, did you observe [Mr. Granados-Mondragon's] entry?
>
> A. No, I didn't, Your Honor.
>
> . . .
>
> Q. And so, when you actually apprehended [Mr. Granados-Mondragon], he was in a car that had been identified to you by someone who had observed the entry and his—his crossing the border and getting into that blue car? Is that your testimony?
>
> A. Yes, sir. Two—Two occupants—Two subjects were observed running from the fence. The same two subjects with the clothing description and the physical description were seen getting into that vehicle. Then we proceeded to stop the vehicle and it was determined that these were the same two subjects that had ran [sic] away from the international boundary fence.

(Transcript of May 28, 1992 Hearing at 43-44, *In re Granados-Mondragon*, (Stanton, I.J.) App. 20a-21a.)

C. The Decision of the Immigration Judge and Appeal to the BIA

Notwithstanding the hole in Agent Green's testimony, the Immigration Judge ordered Mr. Granados-Mondragon deported. On the critical issue of how Mr. Granados-Mondragon entered the United States on July 20, 1991,

the Immigration Judge relied on neither the earlier guilty plea nor the testimony of Agent Green. The Immigration Judge ruled against Mr. Granados-Mondragon on the issue of entry because the Immigration Judge found *his* testimony to be unreliable: "I find that the respondent's testimony as to the manner of entry is not true. I therefore find that the respondent did in fact enter the U.S. by crawling over the border fence." App. 13a.

Mr. Granados-Mondragon appealed this decision to the BIA. He criticized the Immigration Judge's finding that he had entered without inspection. He argued that the record contained no evidence that he, as opposed to his wife, had climbed over the border fence. (ER40-41.) The BIA dismissed the appeal. The BIA did not, however, rely on the Immigration Judge's finding of illegal entry. Instead, the BIA reversed the Immigration Judge's decision on the collateral estoppel effect of the prior guilty plea. It ruled that Mr. Granados-Mondragon's "criminal conviction for illegal entry [was] binding upon the Immigration Judge and this Board under the principle of collateral estoppel." App. 5a.

D. The Decision Below

A split panel of the Ninth Circuit affirmed in an unpublished decision. The panel majority regarded as " 'settled law in this circuit that a guilty plea may be used to establish issue preclusion in a subsequent civil suit.' " App. at 2a (quoting *United States* v. *Section 18*, 976 F.2d 515, 519 (9th Cir. 1992)). The panel majority also rejected Mr. Granados-Mondragon's argument that earlier Ninth Circuit opinions to this effect, namely *United States* v. *$31,697.59 Cash*, 665 F.2d 903 (1982) and *United States* v. *Bejar-Matrecios*, 618 F.2d 81, 83-84 (1980), had been undermined by this Court's statement in *Haring* v. *Prosise*, 462 U.S. 306, 322 (1983) that

"[w]hen a court accepts a defendant's guilty plea, there is no adjudication whatsoever of any issues . . . ." According to the panel majority, "*Haring* . . . merely clarified that the doctrine 'precludes the litigation of only those issues *necessary to support* the judgment entered in the first action.' " App. at 2a (quoting *Haring*, 462 U.S. at 315 (emphasis added)).

Judge Henry A. Politz, sitting by designation from the Fifth Circuit, dissented from the panel decision without opinion. At oral argument, he remarked to the attorney representing the INS that government's position made him "ashamed of [his] government." Tape of Argument Before the Ninth Circuit, *Granados-Mondragon* v. *INS*, No. 99-71652 (August 14, 2001) (on file with the Ninth Circuit).

REASONS FOR ISSUING THE WRIT

This petition raises a question that is frequent and recurring—whether guilty pleas have collateral estoppel effect in subsequent proceedings. Guilty pleas resolve nearly 80% of the more than 70,000 criminal cases disposed of by federal courts each year.[3] Civil, administrative and even new criminal litigation often follows in

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[3] *See* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* Table D-7 (2001) (reporting that 64,148 cases out of 75,650 were disposed of by guilty plea in the twelve months ending September 30, 2001); Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* Table D-7(2000) (reporting that 63,503 cases out of 75,071 were disposed of by guilty plea in the twelve months ending September 30, 2000); Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* Table D-7 (1999) (reporting that 61,239 cases out of 73,481 were disposed of by guilty plea in the twelve months ending September 30, 1999) (all reports available at <<http://www.uscourts.gov/judbususc/judbus.html>> (last visited May 28, 2002)).

the wake of an earlier guilty plea. However, courts, agencies, prosecutors and defendants do not know whether a defendant will be barred from relitigating an issue compromised by an earlier plea. The answer varies from circuit to circuit. This Court should take this opportunity to decide this important question, resolve a long-standing split among the circuits, and end the debate about the meaning of its decision in *Haring*.

I. THE NINTH CIRCUIT'S DECISION SHARPENS A CONFLICT AMONG THE CIRCUITS OVER THE PRACTICE OF GIVING GUILTY PLEAS PRECLUSIVE EFFECT.

1. The preclusive effect of guilty pleas has spawned a deep divide among the circuits. Although the cases arise in many different areas of substantive law, the decisions on this issue apply across the board, without regard to the crimes to which litigants pleaded guilty or to the collateral effects that they subsequently face. Most of the circuits to confront the question have held that guilty pleas have collateral estoppel effect.

a. The Third Circuit has bucked the trend, holding that a guilty plea does not bar relitigation of an issue in a subsequent proceeding. *Bower* v. *O'Hara*, 759 F.2d 1117, 1126 (3d Cir. 1985). In *Bower*, the Third Circuit canvassed its prior decisions and observed that it had previously held that in order for collateral estoppel to apply, "[the issue sought to be precluded] *must have been actually litigated*." *Id.* at 1125 (emphasis supplied) (*quoting Haize* v. *Hanover Ins. Co.*, 536 F.2d 576, 579 (3d Cir. 1976)). Noting that Professor Allan Vestal had tried, but failed, to persuade the American Law Institute to abandon this standard in favor of a less restrictive "incentive and opportunity to litigate" standard in the Restatement (Second) of Judgments, *Bower* at 1125, the

Third Circuit refused to give O'Hara's prior guilty plea preclusive effect.[4]

b. The Tenth Circuit has similarly held that "the government may not use a judgment following a plea of guilty to collaterally estop a criminal defendant from relitigating an issue in a subsequent criminal proceeding." *United States* v. *Gallardo-Mendez*, 150 F.3d 1240, 1246 (10th Cir. 1998). In *Gallardo-Mendez*, the Tenth Circuit recognized that "[t]he prospect of being collaterally estopped at some future date may discourage criminal defendants from settling criminal charges by pleading guilty." *Id.* at 1243. The Tenth Circuit also recognized that giving collateral estoppel effect to guilty pleas in light of the "potential complex collateral estoppel applications" would increase the burden on courts to determine that defendants had knowingly accepted such pleas. *Id.* at 1244. For these reasons, the Tenth Circuit refused to attach preclusive effect to the defendant's guilty plea in a prior case. *Id.*[5]

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[4] The Third Circuit has since confirmed its position on the lack of preclusive effect of guilty pleas, observing that the New Jersey Supreme Court's decision not to treat a guilty plea as preclusive "is consistent with [the Third Circuit's] interpretation of the Restatement (Second) of Judgments which does not give collateral estoppel effect to guilty pleas, but requires that the issue be '*actually* litigated and determined by a valid and final judgment.' " *Anela* v. *City of Wildwood*, 790 F.2d 1063, 1068 (3d Cir. 1986) (emphasis in original) (*quoting Bower*, 759 F.2d at 1126).

[5] Although the Tenth Circuit could have rested its decision in *Gallardo-Mendez* on Sixth Amendment grounds as the Third Circuit did in another criminal case, *United States* v. *Pelullo*, 14 F.3d 881 (1994), it did not. It chose, instead, to analyze the question on collateral estoppel rather than right to a jury trial terms. The concerns that led the Tenth Circuit to reject collateral estoppel in *Gallardo-Mendez*, complicating the plea process and differing standards of proof, apply with equal force when a guilty plea is used to bar relitigation in a subsequent civil or administrative proceeding.

c. The Ninth Circuit has reached the opposite conclusion on the preclusive effect of guilty pleas in a line of cases stemming from its decision in *Ivers* v. *United States*, 581 F.2d 1362 (1978). In *Ivers*, the Ninth Circuit ignored the difference between the "some evidence" standard of Rule 11 and the preponderance of evidence standard at issue in that case. Without discussing contrary authority or the problems created by giving guilty pleas collateral estoppel effect, the Ninth Circuit took "[the] plea of guilty to be an admission of each and every essential element of the crime charged." *Id.* at 1367.[6]

d. Like the Ninth Circuit, the First Circuit adheres to the view that guilty pleas have preclusive effect in subsequent litigation, having first come to that conclusion in *Fontneau* v. *United States*, 654 F.2d 8 (1981). According to the First Circuit, "collateral estoppel bars the relitigation of issues determined in a criminal proceeding in which the party against whom the earlier decision

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[6] The Ninth Circuit did not rigorously analyze the issue in *Ivers* and has not done so when the issue has arisen since. *See United States* v. *Bejar-Matrecios*, 618 F.2d 81, 84 (9th Cir. 1980); *United States* v. *$31,697.59 Cash*, 665 F.2d 903, 906 (9th Cir. 1982); *United States* v. *Real Property Located at Section 18*, 976 F.2d 515, 518-19 (9th Cir. 1992). In each of these cases, the Ninth Circuit has summarily declared that guilty pleas have collateral estoppel effect before moving on to another issue. *Bejar-Matricios*, 618 F.2d at 83-84 (citing *Ivers* en route to holding that a district court had erred in admitting a copy of a prior judgment); *$31,697.59 Cash*, 665 F.2d at 905-06 (citing *Ivers* en route to rejecting argument that a guilty plea should have collateral estoppel effect only if the requirements of Fed. R. Crim. P. 11 were satisfied); *Section 18*, 976 F.2d at 518-19 (quoting proposition that "guilty plea admitted truth of all the elements charged in the offense" but holding that certain facts necessary to sustain the district court's decision had not been litigated in the earlier proceeding). So accepted has this repeated but unexamined proposition become that the Ninth Circuit no longer deems the issue worthy of a published opinion. *See Granados-Mondragon* at App. 2a.

is asserted has had a 'full and fair opportunity' to litigate that issue." *Id.* at 10 (quoting *Allen* v. *McCurry*, 449 U.S. 90, 95 (1980)).[7]

e. The Second Circuit has likewise held that a criminal conviction by guilty plea "constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case." *United States* v. *Podell*, 572 F.2d 31, 35 (2d Cir. 1978). The Second Circuit treated the issue as decided by this Court's opinions in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951), and *McCarthy* v. *United States*, 394 U.S. 459 (1969), even though neither of those cases confronts the issue.[8]

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[7] The First Circuit's quotation notwithstanding, *Allen* does not address whether a guilty plea should have collateral estoppel effect in a subsequent proceeding. Rather, it holds that section 1983 does not "provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all." 449 U.S. at 104.

[8] *Emich* stands for the proposition that "[i]n the case of a criminal conviction based on a jury verdict of guilty, issues which were essential to the verdict must be regarded as having been determined by the judgment." 340 U.S. at 569. Far from holding that conviction by guilty plea has the same collateral force as conviction by jury verdict, *Emich* highlights the importance of actual adjudication to the bar on relitigation, explaining that "estoppel extends only to questions distinctly put in issue and directly determined in the criminal prosecution." *Id.* (internal quotations omitted). *McCarthy*, although it describes a guilty plea as an "admission of all the elements of a formal criminal charge," 394 U.S. at 466, is off-point entirely. It holds only that a district judge accepting a guilty plea must, as Rule 11 of the Federal Rules of Criminal Procedure expressly directs, ask the defendant "whether [he] understands the nature of the charge against him and whether he is aware of the consequences of his plea." *Id.* at 464.

f. Preclusive effect attaches to a guilty plea in the Fourth Circuit as well. According to the Fourth Circuit in *United States* v. *Wight*, 839 F.2d 193 (1987), "[c]ollateral estoppel or issue preclusion is premised on the notion that a judgment in a prior suit 'precludes relitigation of issues actually litigated and necessary to the outcome of the first action.' " *Id.* at 196 (quoting *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979)). Although a guilty plea, by definition, means that no issues were actually litigated, the Fourth Circuit nonetheless concluded that "a defendant is precluded from retrying issues necessary to his plea agreement in a later civil suit." *Id.*

g. The Fifth Circuit agrees "that collateral estoppel applies equally whether the prior criminal adjudication was based on a jury verdict or a guilty plea." *Brazzell* v. *Adams*, 493 F.2d 489, 490 (5th Cir. 1974). The *Brazzell* court treated the issue as definitely settled by a smattering of circuit and district court opinions. Noting authority and argument to the contrary, the *Brazzell* court simply declined to address them. *Brazzell*, 493 F.2d at 490 (citing as contrary authority *State Farm Mutual Auto. Ins. Co.* v. *Worthington*, 405 F.2d 683 (8th Cir. 1968)).[9]

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[9] Further illustrating the extent of disagreement over whether guilty pleas should have collateral estoppel effect, circuit courts on both sides of the split regarding the preclusive effect of *federal* guilty pleas have, sitting in diversity, written opinions that come to different conclusions about the preclusive effect of guilty pleas entered in *state* courts. For example, the Eighth Circuit, which held in *Hernandez-Uribe* v. *United States*, 515 F.2d 20 (1975) that a federal guilty plea has collateral estoppel effect, held in *Worthington* that under Missouri law, "[a] plea is admissible as an admission against interest but it is not conclusive and [a] defendant may offer his explanation of the plea and his version of the occurrence that occasioned the criminal charge." *Worthington*, 405 F.2d at 687. On the other hand, the Tenth Circuit, which refused to give a federal guilty plea collat-

h. The Sixth Circuit has also concluded that conviction by guilty plea precludes relitigation in a subsequent proceeding in a split decision in *Gray* v. *Commissioner of Internal Revenue*, 708 F.2d 243 (1983). The panel majority did not analyze the issue in any depth. It rested its conclusion on the truism that "[a] guilty plea is as much a conviction as a conviction following jury trial." *Id.* at 246.

In dissent, Judge Merrit criticized the majority's analysis for "beg[ging] the essential question . . . confront[ed] in [the] case: as a matter of judicial policy, should the courts give preclusive effect to guilty pleas?" *Id.* at 248. Judge Merritt concluded that courts should not, for the same reason that the California Supreme Court, through Justice Traynor, refused to give guilty pleas collateral estoppel effect:

> 'When a plea of guilty has been entered in the prior action, no issues have been "drawn into controversy" by a "full presentation" of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Considerations of fairness to civil litigants and regard for the expeditious administration of criminal justice . . . combine to prohibit the application of collat-

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eral estoppel effect in *Gallardo-Mendez*, held in *Metros* v. *District Court*, 441 F.2d 313 (1970), that a guilty plea entered in Colorado state court barred a defendant who pleaded guilty to a charge of heroin possession from pursuing a section 1983 claim against the officers who performed the search that led to his arrest. According to the *Metros* court, the fact that the would-be plaintiff could have challenged in state court the legality of the warrant supporting the search "prevents the relitigation in this suit of [this issue]." *Id.* at 317. *See generally State Farm Fire and Casualty Co.* v. *Fullerton*, 118 F.3d 374, 381 (5th Cir. 1997) (explaining that the number of states that refuse to give guilty pleas collateral estoppel effect rivals the number of states that give guilty pleas collateral estoppel effect).

> eral estoppel against a party who, having pleaded guilty to a criminal charge, seeks for the first time to litigate his cause in a civil action.'

Gray, 708 F.2d at 248 (quoting *Teitelbaum Furs, Inc.* v. *Dominion Insurance Co.*, 58 Cal. 2d 601, 605-606 (1962)).

i. Guilty pleas also have preclusive effect in the Seventh Circuit. The Seventh Circuit announced its adherence to this position in yet another tax case, *Plunkett* v. *Commissioner of Internal Revenue*, 465 F.2d 299 (1972). As the Second Circuit did in *Podell*, the Seventh Circuit found this Court's opinion in *McCarthy* "[to be] strong authority holding that a guilty plea is an admission of all the elements of a formal criminal charge." *Plunkett*, 465 F.2d at 305. Believing the question to be settled, the Seventh Circuit did not acknowledge, let alone address, any opposing view. *Id.*

j. In the Eighth Circuit, "collateral estoppel, where applicable, applies equally whether the previous criminal conviction was based on a jury verdict or a plea of guilty." *Hernandez-Uribe* v. *U.S.*, 515 F.2d 20, 22 (8th Cir. 1975). The Eight Circuit rested its decision on the twin requirements of Rule 11—that a plea must be voluntarily made and have a factual basis. On that basis, and because the other evidence on the disputed point was "strong," *id.*, the Eighth Circuit held that the defendant could not contest an issue elemental to a charge to which he had previously pleaded guilty.

k. The Eleventh Circuit shares the view that guilty pleas have collateral estoppel effect, having first come to this conclusion in *In re Raiford*, 695 F.2d 521 (1983). Recognizing disagreement on the subject, the Eleventh Circuit found "good reasons" for giving guilty pleas collateral estoppel effect. The Eleventh Circuit rooted its

decision on a choice faced by every criminal defendant under Rule 11: "A federal criminal defendant wishing to avoid both a trial and any collateral estoppel effects may ask for court permission to plead *nolo contendere*." *Id.* at 523. According to the Eleventh Circuit, a defendant who fails to take advantage of the opportunity to plead *nolo contendere* "cannot argue subsequently that the lack of a contested trial renders his plea ineffective for collateral estoppel purposes." *Id.*[10]

2. The circuit conflict on the question presented by this petition is direct and undeniable. It is reflected in a

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[10] Although the *Raiford* court suggests otherwise, a plea of *nolo contendere* is not a realistic option for the vast majority of criminal defendants. Rule 11 allows a court to accept a plea of *nolo contendere* "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice." For the last fifty years, U.S. Attorneys have operated under the instruction not to consent to the entry of a *nolo* plea except in the most unusual circumstances and only with the approval of the Department of Justice. *See* Department of Justice, *United States Attorneys' Manual* § 9-16.010 (available at <<http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/>> (last visited June 15, 2002)). *See also United States v. Jones*, 119 F. Supp. 288, 289 n.1 (S.D. Cal. 1954) (quoting memorandum of Attorney General Herbert Brownell to U.S. Attorneys regarding pleas of *nolo contendere*). For these reasons, fewer than 1 out of every 200 criminal cases disposed of in federal court over the last three years ended in a plea of *nolo contendere*. *See* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* Table D-7 (2001) (reporting that 254 cases out of 75,650 were disposed of by *nolo* pleas in the twelve months ending September 30, 2001); Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* Table D-7 (2000) (reporting that 360 cases out of 75,071 were disposed of by *nolo* pleas in the twelve months ending September 30, 2000); Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts* Table D-7 (1999) (reporting that 387 cases out of 73,481 were disposed of by nolo pleas in the twelve months ending September 30, 1999) (all reports available at <<http://www.uscourts.gov/judbususc/judbus. html>> (last visited May 28, 2002)).

host of lower court opinions. It has attracted substantial comment, nearly all of it critical.[11] The outcome of this case, indeed, the future course of Mr. Granados-Mondragon's life, turns on the resolution of this conflict. If, as the Ninth Circuit held below, guilty pleas have collateral estoppel effect, Mr. Granados-Mondragon must return to Mexico, even though he has lived in the United States continuously for more than two decades. If, as the Third and Tenth Circuits have held, guilty pleas do not have collateral estoppel effect, he gets a chance to stay in the country where he and his family have made their lives. This Court should take this opportunity to decide the question.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *HARING* V. *PROSISE*.

1. Although this Court has never addressed the precise question presented by this petition, the decision in *Haring* suggests that guilty pleas should not have collateral estoppel effect. The D.C. Circuit, picking up this signal, has questioned whether "a live debate remains over the preclusive effect of guilty pleas." *Otherson* v. *Dept. of Justice*, 711 F.2d 267, 277 n.11 (1983). The Ninth Circuit insists that *Haring* sends no such signal. According

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[11] *See* 18B Wright, *et al.*, *Federal Practice and Procedure: Jurisdiction 2d* § 4474.1, at 445-468 (2002) (recognizing but criticizing at length the practice of giving guilty pleas collateral estoppel effect); David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 Iowa L. Rev. 27 (1984) (same); Geoffrey C. Hazzard, Jr., *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, 66 Cornell L. Rev 564, 574-586 (1981) (same). The primary, if not the only, scholarly advocate of the contrary position was Professor Allan Vestal who tried but failed to persuade the American Law Institute in drafting the *Restatement (Second) of Judgments*. *See* Allan Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 Cornell L. Rev. 464, 466-97 (1981).

to the Ninth Circuit, *Haring* clarifies that only those issues essential to a prior disposition have preclusive effect in subsequent proceedings. App. at 2a. This Court should grant this petition and issue the writ to clear up the confusion about the significance of its decision in *Haring*.

2. In *Haring*, this Court addressed the question of whether a prior guilty plea should bar a claim under 42 U.S.C. § 1983 to redress alleged violations of the Fourth Amendment. 462 U.S. at 308. The plaintiff, Prosise, had pleaded guilty to a charge of manufacturing a controlled substance. He claimed that the arresting officers had unlawfully searched his apartment. The district court dismissed the complaint on collateral estoppel grounds, taking the guilty plea to be an admission that the search was legal. The Fourth Circuit reversed.

This Court upheld the decision of the Fourth Circuit. Reiterating the rule of *Allen*, this Court held, first, that a plaintiff could be collaterally estopped on a claim under § 1983 based on a prior state-court judgment. *Haring*, 462 U.S. at 313-14. This Court then turned to the question of whether Prosise's plea barred his claim "under the rules of collateral estoppel applied by the Virginia courts." *Id.* at 314. Reviewing the general principles of collateral estoppel as applied in Virginia, this Court explained that "[u]nless an issue was actually litigated and determined in the former judicial proceeding, Virginia law will not treat it as final." *Id.* at 315. Applying these principles, this Court concluded that Prosise's earlier plea would not have collateral estoppel effect because "*no issue* was 'actually litigated' in the state proceeding since Prosise declined to contest his guilt in any way." *Id.* at 316 (emphasis added).

This Court returned to the issue of the collateral estoppel effect of guilty pleas later in the opinion while

dispatching defendants' plea for a special rule of preclusion to bar claims of the sort brought by Prosise. In a footnote, this Court explained that such a rule would not preserve scarce judicial resources:

> Petitioners allude generally to the interests that underlie the principles of collateral estoppel, such as the elimination of the "expense, vexation, waste, and possible inconsistent results of duplicatory litigation." Yet these interests are quite simply inapplicable to this case. When a court accepts a defendant's guilty plea, there is no adjudication whatsoever of any issues that may subsequently be the basis of a § 1983 claim. There is thus no repetitive use of judicial resources and no possibility of inconsistent decisions that could justify precluding the bringing of such claims.

Id. at 322 n. 11.[12] (internal citation omitted).

3. As the D.C. Circuit has observed, *Haring* clearly supports the proposition that guilty pleas should not have collateral estoppel effect:

> The Court held that Prosise, after pleading guilty to criminal charges, was not precluded from bringing a § 1983 suit against police officers for alleged vio-

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[12] Nothing in *Haring* suggests that this Court was confining its remarks about collateral estoppel to Virginia law. As this Court observed earlier in the opinion, federal collateral estoppel law and Virginia collateral estoppel law have in common the element that parties are collaterally estopped only on issues actually litigated. *See id.* at 315. This Court, in fact, pointed out that federal courts and Virginia courts describe this requirement in precisely the same terms. *Id.* at 315 (comparing *Brown* v. *Felsen*, 442 U.S. 127, 139 n.10 (1979) ("[C]ollateral estoppel treats as final only those questions actually and necessarily decided in a prior suit.") with *Luke Construction Co.* v. *Simpkins*, 223 Va. 387 (1982) ("[T]he preclusive effect extends only to those facts in issue which were adjudicated in the former proceeding.")).

> lations of his civil rights that occurred during the search that gave rise to his arrest. One of the three reasons the Court gave was that "the legality of the search . . . was not actually litigated in the criminal proceedings. *Indeed, no issue was 'actually litigated' in the state proceeding since Prosise declined to contest his guilty in any way.*"

Otherson, 711 F.2d at 275 n.8 (quoting *Haring*, 462 U.S. at 316 (emphasis in original)). Based on this reading of *Haring*, the D.C. Circuit questioned whether "a live debate remains over the preclusive effect of guilty pleas." *Otherson*, 711 F.2d at 277 n.11.

4. The Ninth Circuit insists that *Haring* is beside the point. According to the Ninth Circuit, *Haring* "merely clarified that the doctrine of [collateral estoppel] 'precludes the litigation of only those issues *necessary to support* the judgment entered in the first action." App. at 2a (quoting *Haring*, 462 U.S. at 315 (emphasis added)). The Ninth Circuit says nothing about *Haring*'s emphasis on the importance of actual litigation to support the decision to give a prior judgment preclusive effect in a subsequent proceeding. *See id.*

5. *Haring* is one of a handful of cases from this Court that can be read to speak to the issue of whether guilty pleas should have collateral estoppel effect. The signals sent by these cases are, frankly, mixed. Where *Haring* emphasizes that actual litigation of an issue is a necessary condition for invocation of the doctrine, 462 U.S. at 315, *Allen*, in passing and without explanation, defines the trigger for collateral estoppel in terms of the opportunity to litigate, not actual litigation, 449 U.S. at 95. Likewise, where *North Carolina* v. *Alford* holds that a confession of guilt is not an essential element of a guilty plea, 400 U.S. 25, 37 (1970), *McCarthy* describes a guilty plea as an admission of the specific elements of

the charge, 394 U.S. at 466. *Alford* suggests that a guilty plea and subsequent litigation on a point compromised by that plea can coexist. *McCarthy* suggests that they cannot. Rather than leave lower courts to decide whether guilty pleas should have collateral estoppel effect by piecing together quotes from one set of cases or another, this Court should take this opportunity to resolve the issue once and for all.

III. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH RULE 11 AND INCREASES THE BURDEN ON THE COURTS.

Although most of the circuits that have confronted the question have concluded otherwise, the practice of giving guilty pleas collateral estoppel effect cannot be reconciled with the requirements of Rule 11. Moreover, even if it could, the practice undermines the judicial efficiency interests that the doctrine of collateral estoppel exists to serve.

Nothing in Rule 11 of the Federal Rules of Criminal Procedure suggests that a guilty plea should have preclusive effect in a subsequent proceeding. Rule 11 does not demand that the fact issues compromised by a plea be satisfied by proof beyond a reasonable doubt, clear and convincing evidence or even a preponderance of evidence. Rule 11 demands only that there be a factual basis for a plea, a standard that can be satisfied by some evidence. It seems plain that although a plea entered under Rule 11 is probative of the underlying facts in subsequent proceedings, it is not dispositive. Put another way, a defendant who has pleaded guilty to a particular offense should have the opportunity to explain to the finder of fact in a subsequent proceeding why he or she entered that guilty plea and to demonstrate that the facts

do not support the charge to which the guilty plea was entered.[13]

Not only is the practice of giving guilty pleas preclusive effect not mandated or even authorized by Rule 11, it also comes at significant cost to the courts. Attaching preclusive effect to a guilty plea makes a plea, from the defendant's perspective, less attractive. Giving guilty pleas collateral estoppel effect encourages defendants to litigate every issue to final judgment, however sensible it may be to compromise rather than fight in a particular instance. Guilty pleas should be treated like admissions and stipulations in the civil context and be given collateral estoppel effect only when it can be shown that the parties specifically intended that "the issue[s] be foreclosed in other litigation." *See* 18A Wright, *et al.*, *Federal Practice and Procedure: Jurisdiction 2d* § 4443, at 252-53 (2002). Federal courts should not give guilty pleas collateral estoppel effect in subsequent proceedings for the same reason that they do not regard stipulations or admissions in one civil suit as preclusive on those same issues in another—to avoid needless litigation. *See Restatement (Second) of Judgments* § 27 comment e ("[I]f preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.").[14]

The practice also seems bound to complicate the plea process itself. Under Rule 11, a court accepting a guilty plea must explain the direct consequences of the plea to the defendant. Failure to do so renders a guilty plea

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[13] *See* 2 Weinstein, *et al.*, *Weinstein's Federal Evidence*, § 410.07[2] (2d ed. 2002).

[14] *See also Otherson*, 711 F.2d at 274-75 (quoting same).

invalid. The fact that a judgment of conviction resting on a guilty plea will be treated as conclusive of the underlying facts in subsequent proceedings certainly seems to be a direct consequence of entering the plea in the first instance.[15] Although courts accepting pleas can legitimately claim that the specific circumstances in which the defendant may be faced with collateral estoppel effects are beyond their control or even knowledge (*e.g.*, deportation proceedings, civil forfeiture proceedings, subsequent criminal cases), they would seemingly have to tell defendants entering guilty pleas that the guilty plea will be treated as conclusive on the underlying facts in any subsequent proceeding. At the very least, a litigant facing the prospect of preclusion based on an earlier plea will seek to withdraw that plea solely in order to avoid collateral effects.

The costs associated with giving guilty pleas collateral estoppel effect are not balanced by any apparent benefit. The one goal that the practice exists to serve—avoiding the unseemly appearance of defendants confessing facts in one proceeding and contesting them in another—can be achieved without issue preclusion. A defendant who confesses his or her guilt will be hard pressed, except in unusual cases such as this one, to persuade the trier of fact in a subsequent proceeding that the plea and the accompanying statements should be ignored. In the end, treating guilty pleas as probative of the underlying facts rather than conclusive will only matter in hard cases such as this one: where a defendant had obvious reasons for entering his plea even though the record plainly shows that he did not do what he pleaded guilty to having done.

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[15] *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. 336 n.23 (1979) ("[T]he whole premise of collateral estoppel is that once an issue has been resolved in a prior proceeding, there is no further factfinding function to be performed.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 21, 2002

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-71652
INS No. A91-285-858
Filed January 17, 2002

ANTONIO GRANADOS-MONDRAGON,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Appeal from a Decision of
the Board of Immigration Appeals

Argued August 14, 2001
Submission Deferred August 14, 2001
Submitted January 17, 2002
San Francisco, California

Before:

POLITZ,* KOZINSKI and O'SCANNLAIN,
Circuit Judges.

MEMORANDUM**

It is "settled law in this circuit that a guilty plea may be used to establish issue preclusion in a subsequent civil suit." *United States* v. *Section 18*, 976 F.2d 515, 519 (9th Cir. 1992); *see also United States* v. *$31,697.59 Cash*, 665 F.2d 903, 904 (9th Cir. 1982); *United States* v. *Bejar-Matrecios*, 618 F.2d 81, 83-84 (9th Cir. 1980); *Ivers* v. *United States*, 581 F.2d 1362, 1367 (9th Cir. 1978). Granados argues that *Haring* v. *Prosise*, 462 U.S. 306 (1983), limited the doctrine of collateral estoppel to issues that are "actually litigated," as opposed to plea-bargained. *Id.* at 316. *Haring*, however, merely clarified that the doctrine "precludes the litigation of only those issues *necessary to support* the judgment entered in the first action." *Id.* at 315 (emphasis added). That Granados entered the United States without inspection was a predicate for his conviction under 8 U.S.C. § 1325. Granados is consequently estopped from relitigating this issue in his deportation proceedings.

Granados also contends that the fact of his conviction alone is insufficient to establish deportability, because a violation of section 1325 is not among the offenses specified in 8 U.S.C. § 1251(a)(2) (1994), for which a show-

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* The Honorable Henry A. Politz, United States Senior Circuit Judge for the Fifth Circuit, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

ing of a conviction is enough to support deportation. The Board, however, used Granados's conviction not as the basis for deportation under section 1251(a)(2), but to preclude him from relitigating the issue of whether he entered the country without inspection in violation of 8 U.S.C. § 1251(a)(1)(B) (1994). Used for this purpose, Granados's guilty plea and resulting conviction are "wholly adequate to support deportation." *Larios-Mendez* v. *INS*, 597 F.2d 144, 146 (9th Cir. 1979).

We likewise reject Granados's claim that, because his penalty for the violation of section 1325 was relatively minor, he lacked sufficient incentive to litigate the charge. Although Granados's sentence was only forty-five days, it may have been reduced as a result of his guilty plea, and is therefore not indicative of his incentive. Because the maximum term of imprisonment authorized by section 1325 is six months, Granados's "prior conviction [was] for a serious offense so that [he] was motivated to fully litigate the charges." *Section 18*, 976 F.2d at 518 (quoting *Ayers* v. *City of Richmond*, 895 F.2d 1267, 1271 (9th Cir. 1990)).

AFFIRMED.

Judge POLITZ dissents.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A91 285 858 - El Centro

Date: November 30, 1999

In re: ANTONIO *GRANADOS*-MONDRAGON

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Rudy Cardenas, Jr., Esquire
Cardenas & Fifield
1030 Broadway, Suite 108
El Centro, California 92243

ON BEHALF OF SERVICE:

Joseph M. Ragusa
General Attorney

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act
[8 U.S.C. § 1251(a)(1)(B)]—
Entered without inspection

APPLICATION: Suspension of deportation.

ORDER:

PER CURIAM. In a decision dated July 27, 1993, the Immigration Judge found the respondent deportable as charged, denied the respondent's request for suspension of deportation and ordered him deported. The respondent has appealed from that decision. The appeal will be dismissed.

The respondent is a 39-year-old native and citizen of Mexico. Concerning the factual basis of the respondent's case, we find that the Immigration Judge has accurately stated the facts of the respondent's case and we adopt his statement on this issue (I.J. at 2-4).

On appeal the respondent challenges the finding of deportability in his case. We find however that the Immigration Judge properly found the respondent deportable as charged. Concerning the entry without inspection charge, we find that the respondent's criminal conviction for illegal entry is binding upon the Immigration Judge and this Board under the principle of collateral estoppel. *Matter of Rina*, 15 I&N Dec. 346 (BIA 1975). We disagree with the Immigration Judge's finding that the respondent was not motivated to litigate this issue in the criminal matter. We find that the threat of jail and the possibility of deportation were ample motivation for the respondent to fully litigate the issue. We further find that the issue of entry is the same in both proceedings as the definition of entry in section 101(a)(13) of the Immigration and Nationality Act is applicable to both section 241 and section 275 of the Act. The Immigration Judge in attempting to distinguish entry issues in criminal proceedings as opposed to deportation proceedings cites the availability of *Rosenberg v. Fleuti*, 374 U.S. 449 (1963) in the latter. We find such distinction irrelevant as the respondent, on account of his participation in the smuggling, does not raise this defense and it is not avail-

able to him. *See Laredo-Miranda v. INS*, 555 F.2d 1242 (5th Cir. 1977) (aiding illegal aliens to enter surreptitiously); *Cuevas-Cuevas v. INS*, 523 F.2d 883 (9th Cir. 1975) (smuggling aliens).

We further find that the Immigration Judge correctly concluded that the respondent was deportable for alien smuggling. Even accepting the respondent's claim that he did not physically assist his wife in entering, the respondent admits that he planned his wife's illegal entry, arranged such endeavor with a smuggler, and arranged to meet her in the United States in order to transport her (Tr. at 49, 51). Such conduct constitutes conduct within the scope of section 241(a)(1)(E)(i) of the Act. *Matter of Vargas-Banuelos*, 13 I&N Dec. 810 (BIA 1971).

Finally, we find that the Immigration Judge correctly found that the respondent is not eligible for suspension of deportation. In our review, we find that the Immigration Judge properly found the respondent ineligible for suspension of deportation for lack of good moral character under section 101(f)(3) of the Act due to his participation in the smuggling of his wife (I.J. at 10-11). The respondent cites the possibility of a waiver of section 212(a)(6)(E)(ii) by section 212(d)(11). As the Immigration Judge notes, however, the respondent did not merely fail to present proper documents; he entered illegally. On such facts, the Immigration Judge correctly concluded that the respondent is barred from relief under section 101(f)(3) of the Act.

Accordingly, the appeal is dismissed.

/s/ [ILLEGIBLE]
FOR THE BOARD

UNITED STATES DEPARTMENT 0F JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION Judge
El Centro, California

File No.: A 91 285 858 July 27, 1993

In the Matter of

ANTONIO GRANADOS-MONDRAGON,

Respondent.

IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(1)(B) Immigration and Nationality Act (INA);
Lodged charge: Section 241(a)(1)(E)(i) INA.

APPLICATION: Termination; 244 INA;
241(a)(1)(E)(iii) INA.

ON BEHALF OF RESPONDENT:

Rudy Cardenas, Jr., Esquire
1030 Broadway, Suite 108
El Centro, California

ON BEHALF OF SERVICE:

Wayne Cantero, Esquire
Trial Attorney
1115 North Imperial Avenue
El Centro, California

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 33-year-old male, native and citizen of Mexico. The Immigration and Naturalization Service instituted deportation proceedings against him alleging that he had entered the country without proper inspection. *See* Exhibit 1. The Order to Show Cause was properly served.

A hearing on the merits was begun on May 28th, 1992. At that time, the respondent admitted alienage but denied that he had entered the country without inspection or that he had been granted legal permanent residence. The Court then received evidence on the issues. The Government introduced evidence which indicates that the respondent is indeed a legal permanent resident and offered the testimony of one of its officers concerning the respondent's status. *See* Exhibits 2, 4, and 5.

The Service also called Agent Green of the United States Border Patrol. Agent Green testified that the respondent and the respondent's wife were observed crawling over the border fence together. In addition, the agent testified that the respondent was tracked by another officer from the border fence too. The respondent was ultimately convicted for illegal entry in the U.S. District Court. *See* Exhibit 3. The hearing of May 28th was then adjourned.

On December 11, 1992, the respondent appeared and testified. He testified that he did not crawl over the border fence with his wife. He explained that he had gone to Mexico and paid a smuggler to bring his wife into the U.S. According to the respondent's testimony, the plan was for the respondent to be waiting on the U.S. side of the border to pick up his wife and from there to continue on to their home in the United States. The respondent testified that he had left Mexico approximately half an

hour earlier than his wife's scheduled departure. He claims to have entered into the U.S. through the port of entry in his automobile. He says he was inspected by officers at that time.

According to the respondent's testimony, his wife was crossing the border with the help of a smuggler. The respondent was on the U.S. side watching her enter. She fell. The smuggler ran. The respondent went to the aid of his wife.

This of course contrasts with the Government's testimony which showed that the respondent crawled over the fence with his wife and that he was observed doing that.

The respondent also testified that he had paid a smuggler for some documents or papers that the respondent's wife would use. He explained that the papers had been rented, so to speak. In other words, the papers would ultimately have to be returned to the smuggler. These papers were in the name of some other person, certainly not the respondent's wife.

At the conclusion of that testimony, the Government indicated it desired to file a lodged charge. The case was then adjourned to February 1993. On that date, the Government indeed filed a charge alleging that the respondent is deportable for having aided and abetted the entry of another alien in violation of law. Exhibit 6.

On July 27, 1993, the case came on again for hearing. The lodged charge was marked in evidence. The parties were offered the opportunity to call additional witnesses or to present additional evidence on the issue of deportability. Both parties declined. The Court then took the case under advisement.

One of the initial issues in the case is whether the Court is bound by the criminal court's determination that the respondent entered the U.S. illegally. Essentially this

is an issue of the applicability of the doctrine of collateral estoppel or issue preclusion as it is sometimes referred to. In *Matter of Rena*, 15 I&N Dec. 346 (BIA 1975), the Board of Immigration Appeals held that a respondent who is convicted of illegal entry is collaterally estopped from re-litigating the issue of illegal entry in a deportation proceeding. The Board went on to say that such a conviction is dispositive of any possible issue concerning entry that may arise by virtue of the Supreme Court's decision in the landmark case *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). Under the doctrine of collateral estoppel, issues actually decided and necessarily involved in the determination of a prior judgment may not be re-litigated by parties in a subsequent action. Thus, a fact established at a prior hearing is conclusive on the parties in a subsequent action. *Parklane Hosiery v. Shor*, 99 S.Ct. 645, 649; *Montana v. U.S.*, 99 S.Ct. 970 (1979). Even a fact established by a guilty plea can preclude a re-examination of that issue in a subsequent proceeding. *U.S. v. Bejar-Matrecios*, 618 F.2d 81 (9th Cir. 1980). *See also Otherson v. INS*, 711 F.2d 267 (D.C. Cir. 1983) (holding prior criminal conviction may be accorded preclusive effect at a later merits systems protection board hearing).

Both *Rena* and *Matter of Kolk*, 11 I&N 103 (BIA 1965), say that the term entry is given but one definition under the Immigration and Nationality Act. Hence, that definition is the same whether used in connection with criminal offenses or in connection with deportable offenses. Entry into the U.S. is the essence of the offense in 8 U.S.C. 1325, which is the section under which the respondent was convicted. *See* Exhibit 3.

In *Montana v. U.S.*, *supra*, the Supreme Court set out a three-pronged analysis to determine the appropriateness of the application of the doctrine of collateral

estoppel. One of those factors is that there must be a similarity of issues before collateral estoppel is applied. It is true that both criminal and deportation proceedings in this context concern themselves with the respondent's time, manner and place of entry into the U.S. However, as the Service has conceded, the issue of *Fleuti* is never raised as a defense in criminal prosecutions, despite the fact that entry has but one definition under the Act. I have been able to locate no case when the courts of the lands have applied *Fleuti* in a criminal prosecution. Apparently, criminal courts concern themselves only with the conduct in crossing the border into the U.S., *i.e.*, whether the alien crossed the border into the U.S. at a designated port of entry. The innocence of the departure and the interruption of status do not arise in the criminal context. These, however, are issues of paramount importance in the deportation context. Deportation proceedings review the manner of departure as well as the manner of return to the U.S. Not only does this require a factual inquiry which differentiates the two proceedings, but the law of the case is significantly different if for no other reason than that *Fleuti* applies only in deportation proceedings. Hence, the issues in the criminal case and in the deportation case are not the same.

Even if the issues were deemed to be identical in the criminal case and in the deportation case, collateral estoppel need not necessarily be applied. The *Montana* Court held that the special circumstances of a given case may warrant an exception to the normal rules of collateral estoppel or issue preclusion. The court said, in footnote 11, that a redetermination of the issues is warranted if there is reason to doubt the quality, extensiveness or fairness of procedures followed in the prior litigation. Issue preclusion is only to be invoked after careful

inquiry as it blocks unexplored paths that may lead to truth. Indeed, issue preclusion is sometimes unfair if the party to be bound lacked an incentive to litigate in the first trial, especially in comparison to the stakes in the second trial. *Otherson v. INS*, *supra*. Among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party to be estopped not only had a full and fair opportunity but an adequate incentive to litigate to the hilt the issues in question. *See generally Hering v. Prosisz*, 103 S.Ct. 2368 (1983). The respondent has argued that there was not an adequate incentive to litigate to the hilt in the criminal proceeding involving this respondent. Ordinarily the stigma and other disabilities associated with criminal convictions may be deemed a great incentive to litigate. This is particularly true where the looming conviction is a felony. However such is not the case if the accused faces but a misdemeanor and a sentence of mere days. Consequently the stakes in the criminal proceedings (being branded as a misdemeanant and required to serve forty-five days) may be considered to be considerably less than the stakes in his deportation hearing (banishment from his home and family). "Deportation visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised less the procedure by which he is deprived of that liberty not meet the essential standards of fairness." *Tittle v. INS*, 322 F.2d 221 (9th Cir. 1963), quoting *Bridges v. Wixon*, 326 U.S. 135, 154, 65 S.Ct. 1443, 1452-1453 (1945). Consequently, I find that the issue of entry can and should be re-examined. Issue preclusion should not be invoked in the circumstances of this case.

However, in re-examining the issue of entry, I find that the respondent's testimony is not to be believed.

I find, as the officer testified, that the respondent did indeed enter without proper inspection. I believe that the respondent and his wife did in fact crawl over the border fence.

The reasons that I find it difficult to believe respondent have to do with his conduct in connection with the case in general. First, the respondent has shown a willingness to lie to obtain the desired result. He illustrated this when he initially denied to the arresting officers that his wife was in fact his wife. He sought to explain away this behavior by saying that the smuggler warned him not to admit that he was married to the person he was smuggling. The respondent also admitted that he had "rented" some false documents for his wife to use. So in this scheme, the respondent shows a further willingness to weave a web of deceit, all of which cause me to disbelieve him.

Similarly, the respondent, by pleading guilty to illegal entry when in fact he says he did not enter illegally, has perpetrated further deceit. He indicates that he pled guilty, that is admitted facts which were not true, in order to obtain an early release. This behavior puts into question his credibility. Obviously he lied or at best misled the criminal court. By pleading guilty only to later deny the guilt shows a willingness on his part to manipulate the truth with only a view again to his desired result. Consequently, I find that the respondent's testimony as to the manner of entry is not true. I therefore find that the respondent did in fact enter the U.S. by crawling over the border fence. He is, therefore, deportable for having entered the United States without proper inspection.

I also find that the respondent did aid and abet the illegal entry of his wife, who is herself an alien. Whether I believe the Service theory: that he helped her climb

over the border fence; or whether I believe the respondent's explanation: that he went to Mexico and paid a smuggler to bring the respondent's wife into the U.S., is ultimately irrelevant. Under either set of facts, the respondent is clearly deportable for aiding and abetting the illegal entry of another alien, just as charged in the lodged charge. I therefore find that the respondent is deportable on two grounds: illegal entry and alien smuggling.

The next issue then is whether the respondent is eligible for relief. Under Section 241(a)(1)(E)(iii), the respondent's deportability for having aided and abetted the illegal entry of his wife is waivable. However, there is no apparent waiver for illegal entry. Instead, the respondent has filed an application for suspension of deportation. That application however has not been admitted in evidence. It does not appear, however, that the respondent is eligible for suspension of deportation.

Suspension of deportation is described in Section 244 INA. That section requires that, among other things, the respondent seeking suspension of deportation be a person of good moral character. Good moral character is defined under Section 101(f) INA. The definition does not say what is good moral character; rather, it explains what is not good moral character. Among those classes of persons who are not of good moral character are those persons who have been involved in aiding and abetting the illegal entry of other aliens. *See* 212(a)(6)(E). However, that same section refers to the possibility of a waiver. *See* 212(a)(6)(E)(iii). The waiver is described in Section 212(b)(11) INA. That Code section says in important part, "[t]he Attorney General may, in his discretion. . . waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for

permanent residence who temporarily proceeded abroad voluntary and not under an order of deportation, and who is otherwise admissible to the United States as a returning resident under Section 211(b). . . ." In this case, the respondent is not otherwise admissible as a returning resident. The respondent entered illegally. So he is not otherwise admissible under Section 211(b). Section 211(b) refers to returning resident immigrants as defined in Section 101(a)(27)(A). It is clear from a review of that section that this respondent, who entered illegally, albeit he was at that time a legal permanent resident, does not fall into the category defined under 101(a)(27). Consequently, respondent is not eligible for relief under Section 244.

Having considered all of the evidence of record, whether discussed above or not, I make the following order:

ORDER

IT IS THEREFORE ORDERED that the respondent be deported from the United States to Mexico on the basis of the allegations and charge in the Order to Show Cause and in the lodged charged.

/s/ JACK W. STATON
JACK W. STATON
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-71652
INS No. A91-285-858
Filed March 26, 2002

ANTONIO GRANADOS-MONDRAGON,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before:

POLITZ,* KOZINSKI and O'SCANNLAIN,
Circuit Judges.

ORDER

The petition for rehearing is denied and the petition for rehearing en banc is rejected. Fed. R. App. P. 35; Fed. R. App. P. 40.

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* The Honorable Henry A. Politz, United States Senior Circuit Judge for the Fifth Circuit, sitting by designation.

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

File A 91 285 858

Matter of

ANTONIO GRANADOS-MONDRAGON,

Respondent.

In DEPORTATION Proceedings

Transcript of Hearing

Before JACK W. STATON, Immigration Judge

Dated May 28, 1992 Place: El Centro, California

Transcribed by DEPOSITION SERVICES, INC.
At Rockville, Maryland

Official Interpreter: Ms. Elizabeth Sanchez

Language: Spanish

Appearances:

For the Immigration and Naturalization Service:

Wayne Cantero, Esquire
(Trial Attorney)

For the Respondent:

Rudy Cardenas, Jr., Esquire

MR. CARDENAS TO MR. GREEN

[41] Q. He—He entered without inspection and yet he paid a smuggler to bring her into the country? Is that unusual?

A. It's not—It's not that unusual because a lot of people—a lot of illegals that try to enter are not familiar with the territory or the manner in which would be the best way to try and avoid the Border Patrol. So, they pay a smuggler or a guide, whichever they're called down there, and they show them the route and the manner in which they can go and—and enter the most effectively.

Q. How did you first come in—know that there was an illegal entry going on?

A. It was observed from an area approximately .8 miles west of the area of the projects where they entered and it was observed through binoculars. The two individuals climbed down the international boundary fence, ran across a drag road and towards the area of the projects and then they were seen exiting the area of the projects and entering a vehicle. And then myself and Agent Tybinko (phonetic sp.) and Rodriguez (phonetic sp.) made a vehicle stop after the occupants were observed entering the vehicle.

Q. Was it ever determined whether the female was in fact related to Mr. Granados?

A. I am not sure. I don't think I determined that at all. I—Somebody else might have but I didn't, sir.

[42] Q. And his footprints led up to the fence?

A. They led away from the fence.

Q. Did the footprints indicate that the same footprints—his footprints—were they ever in Mexico? Did you—Did you look into that?

A. Well, the area on the south side of the fence it's—it's extremely difficult to see a lot of the tracks and we're not—we don't go down too close to the fence because we either get rocked or spit on or something of that sort. So, we try to stay away from the fence. They were observed. It was an observed entry. The two subjects were observed climbing down the fence and going towards the projects.

Q. Was the female injured at all?

A. I don't recall if she was or not.

MR. CARDENAS TO JUDGE

Q. Your Honor, since he has reviewed the I-213, I was wondering if I might review it.

A. I think that he should be able to review it.

JUDGE FOR THE RECORD

We'll be off the record while he reviews the Form I-213.

(Off the record)

JUDGE FOR THE RECORD

We're back on the record.

JUDGE TO MR. CARDENAS

[43] Q. Have you had a chance to review the Form I-213, Mr. Cardenas?

A. Yes, Your Honor.

Q. Okay. Are you prepared to go forward then?

A. No further questions, Your Honor.

Q. All right.

JUDGE TO MR. GREEN

Q. Mr. Green, did you observe the respondent's entry?

A. No, I didn't, Your Honor.

Q. Was anybody who was with you at the time you went and apprehended the respondent one of those persons who observed his entry?

A. I'm not sure if there was, Your Honor.

Q. Okay. And you said you don't go down to the border fence because people throw rocks at you?

A. Rocks, bottles, they spit on you, yes.

Q. Okay.

A. In that particular area, it's not a good area—not a good idea to be down near the fence.

Q. So, if you didn't go to the fence, how did you determine that his footprints led from the fence?

A. I personally didn't go down to the fence, Your Honor. Some—Another agent went down there and tracked his tracks.

[44] Q. Okay. So, and that agent went actually to the fence, tracked them and then he told you that—that his footprints led from there?

A. That's correct.

Q. And so, when you actually apprehended the respondent, he was in a car that had been identified to you by someone who had observed the entry and his—his crossing the border and getting into that blue car? Is that your testimony?

A. Yes, sir. Two—Two occupants—Two subjects were observed running from the fence. The same two subjects with the clothing description and the physical description were seen getting into that vehicle. Then we proceeded to stop the vehicle and it was determined that these were the same two subjects that had ran away from the international boundary fence.

Q. And only two people were in the car?

A. Yes, sir.

Q. And one was a man and one was a woman?

A. That's correct.

Q. And you don't know if they were related or not?

A. No, those—those facts were never determined as far as I can recall.

Q. All right.

JUDGE TO MR. CANTERO